(21)

No. 88-1905

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

KELLER, *et al.*,

Petitioners,

v.

STATE BAR OF CALIFORNIA, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of California

BRIEF OF THE STATE BAR OF WISCONSIN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS, JOINED BY THE FLORIDA BAR, THE NEW HAMPSHIRE BAR ASSOCIATION, THE STATE BAR OF MONTANA, THE OKLAHOMA BAR ASSOCIATION, THE WASHINGTON STATE BAR ASSOCIATION, AND THE WYOMING STATE BAR

Of Counsel:

PAUL F. HILL
General Counsel
BARRY S. RICHARD
Of Counsel to
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600

STEPHEN L. TOBER
Counsel for
The New Hampshire Bar Association
Aeschliman & Tober, P.A.
281 Middle Street - P.O. Box 1151
Portsmouth, New Hampshire 03801
(603) 431-1002

JOHN S. SKILTON *
WILLIAM M. CONLEY
ROBERTA F. HOWELL
FOLEY & LARDNER
1 South Pinckney Street
Post Office Box 1497
Madison, Wisconsin 53701-1497
(608) 257-5035

* *Counsel of Record for Amicus Curiae*

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

32 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

OTHER AUTHORITIES:

No. 88-1905

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

KELLER, *et al.*,

Petitioners,

v.

STATE BAR OF CALIFORNIA, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of California

BRIEF OF THE STATE BAR OF WISCONSIN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS, JOINED BY THE FLORIDA BAR, THE NEW HAMPSHIRE BAR ASSOCIATION, THE STATE BAR OF MONTANA, THE OKLAHOMA BAR ASSOCIATION, THE WASHINGTON STATE BAR ASSOCIATION, AND THE WYOMING STATE BAR

By consent of the parties,[1] the State Bar of Wisconsin ("Wisconsin Bar") submits this brief in support of respondents, who seek affirmance of the decision of the Supreme Court of California upholding the right of the State Bar

[1] Consistent with this Court's Rule 36.2, the original, written consents of the parties accompany the filing of this *amicus* brief.

of California, as an integrated bar, to use dues to finance activities, other than election campaigning, which are germane to its statutory mission to promote "the improvement of the administration of justice." The Wisconsin Bar has been authorized to state that the following integrated bars join in this brief: The Florida Bar, the New Hampshire Bar Association, the State Bar of Montana, the Oklahoma Bar Association, the Washington State Bar Association, and the Wyoming State Bar.

INTEREST OF *AMICUS CURIAE*

The Wisconsin Bar was established as an integrated bar under interim rules promulgated by the Supreme Court of Wisconsin in 1956. Two years later integration became permanent. The court's integration rule was upheld in the face of a First Amendment challenge in *Lathrop v. Donohue*, 367 U.S. 820, *reh'g denied*, 368 U.S. 871 (1961). In 1988, the Wisconsin Supreme Court nevertheless was prompted to suspend its long-standing integration rule by a decision of the District Court for the Western District of Wisconsin declaring the rule unconstitutional. *See Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478 (W.D. Wis.), *rev'd sub nom. Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S. Ct. 204 (1989).

Despite the reversal of that decision by the Seventh Circuit, litigation against the Wisconsin Supreme Court and the Wisconsin Bar continues in the Western District of Wisconsin. In addition to the original suit for injunctive and monetary relief brought by a single plaintiff who has asserted that the Bar must defend each and every activity under a compelling interest/least restrictive means test,

a second, purported class action is now being pursued by separate counsel, claiming entitlement, among other relief, to some $500,000 in compensatory and $600,000 in punitive damages. *Crosetto, et al. v. Heffernan, et al.*, Case No. 88-C-433-C (W.D. Wis). These monetary claims are based in part on the Wisconsin Supreme Court's and the Bar's alleged delay in instituting a dues reduction plan for sums spent on legislative activities.[2]

As a result of the uncertainty created by these lawsuits, as well as this Court's grant of *certiorari* in *Keller*, the Wisconsin Supreme Court has continued to postpone any decision regarding the return of the Wisconsin Bar to integrated status.[3]

This background gives the Wisconsin Bar an acute awareness of the potential for disruption that has been, and may be caused, if concerns for protection of First Amendment interests of dissenting members are permitted ultimately to overwhelm the substantial public benefits derived from integrated bars. As the *Keller* lawsuit and suits in other jurisdictions demonstrate, the Wisconsin Bar's experience is not altogether unique. If the First Amendment interests at stake are read as expansively as urged by a number of the *amici* supporting the petitioners, the integrated bar

---

[2] Courts have differed on whether integrated bars are entitled to Eleventh Amendment protection. *Compare Bishop v. State Bar of Texas*, 791 F.2d 435, 438 (5th Cir. 1986), *with Levine*, 679 F. Supp. at 1487-88. In a subsequent unpublished opinion, the district court in *Levine* also suggested that the Wisconsin Bar may not be entitled to qualified immunity. *But see Werle v. Rhode Island Bar Ass'n*, 755 F.2d 195 (1st Cir. 1985) (Rhode Island Bar entitled to absolute or qualified immunity in action by doctor challenging state unauthorized practice of law statute).

[3] During 1988 and 1989, the Wisconsin Bar has experienced an approximate drop in membership of 15% to 20%, reducing total membership from approximately 15,000 to 12,500.

concept upheld by this Court in *Lathrop* would be rendered unworkable. Indeed, many of the *amicus* briefs are subtle (and not so subtle) efforts to overturn the *Lathrop* ruling or to achieve a similar result indirectly.

Accordingly, the Wisconsin Bar's interest in this appeal, as well as the interest of the integrated bars joining in this brief, extends not just to urging that integrated bars across the country continue to be permitted to lend their expertise to discussions of law reform and policy, whether through lobbying or providing information to legislatures and courts. The interest extends more generally to urging that this Court not accept the invitation of petitioners and supporting *amici* to adopt a new or modified First Amendment standard which will unduly restrict the diverse structures and important and innovative activities of integrated bars that now help to promote the fair and efficient administration of justice in this country.

SUMMARY OF ARGUMENT

From the outset of the integrated bar movement early in this century, state integrated bars have been charged with promoting professionalism and facilitating law reform. Contrary to the assertions of petitioners and supporting *amici*, recent First Amendment case law is not inconsistent with an integrated bar's historical participation in law reform efforts. In particular, the First Amendment does not prohibit an integrated bar from lobbying or providing information to legislatures and courts as long as those activities are germane to the bar's important public purposes, including the improvement of the administration

of justice. While integrated state bars across the country have followed diverse methods of fulfilling their public obligations, and of accommodating dissent among their members, this diversity has contributed to the rich history and current vitality of the integrated bar movement. To adopt a new restrictive, federal standard for a bar's legislative advocacy will needlessly destroy that diversity, and may well destroy the viability of the integrated bar itself as dissenters push federal courts for an ever broadening notion of what is "political" or "ideological."

ARGUMENT

I.

A BRIEF REVIEW OF THE HISTORY OF THE INTEGRATED BAR CONCEPT DEMONSTRATES ITS LONG-ACCEPTED ROLE IN PROMOTING PROFESSIONALISM AND FACILITATING LAW REFORM.

As with so many of our legal doctrines and institutions, the integrated bar concept is traceable to England. In *The Lawyer from Antiquity to Modern Times* (1953), Dean Pound explained that through the Inns of Court "English lawyers at the end of the middle ages had become a well developed, well organized profession, maintaining a system of societies or associations promoting a professional tradition, providing adequate training of those who were to enter the profession, and actively furthering the development of the law." *Id.* at 87-88. Over time, courts delegated the responsibility of admitting and disciplining barristers to the Inns. *Id.* at 99-100; Lund, *The Legal Profession in England and Wales*, 35 J. Am. Judicature Soc'y 134, 135-36 (1952).

Barred from admission to the Inns of Court, solicitors or attorneys formed their own professional organization, The Law Society. 6 *Holdsworth's History of English Law* 442-43 (1924). While The Law Society was said to be "voluntary," Parliament charged it with powers over solicitors comparable to those of the Inns over barristers, including the training, examination and admission of solicitors, as well as the power to suspend a license, impose fines, charge a license fee and require contribution to a security fund for clients. Lund, *supra*, at 139-41.

In the late eighteenth century, the lawyers of Upper Canada (now Ontario) formed a Law Society similar to the English professional organizations. By the early 1900's, lawyers were required to join and pay dues to similar organizations in every Canadian province. The Society in each province was governed by a representative board (Benchers) whose responsibilities included the supervision of legal education, examination of those seeking bar admission and suspension and disbarment, subject to court review. *See* Adams, *The Self-Governing Bar*, 26 Am. Pol. Sci. Rev. 470, 470-71 (1932); Gordon, *The Organization of the Canadian Bar*, 4 Ore. L. Rev. 200, 200-01 (1925).

Influenced by his observations of the Canadian Bar system while visiting Toronto in 1914, Herbert Harley, founder and secretary of the American Judicature Society, resolved to promote integration in the United States. Winters, *Integration of the Bar—You Can't Lose*, 39 J. Am. Judicature Soc'y 140, 141 (1956). In a historic address at Lincoln, Nebraska that same year, Harley called for the creation of an all-inclusive bar as a means of reforming and improving the profession and society as a whole. Harley, *A Lawyer's Trust*, 7 Neb. State Bar A. Proc. 143, *reprinted in* 29 J. Am. Judicature Soc'y 50 (1945). This call for integration struck a responsive chord for those in the pro-

fession who had become discouraged by the inability of voluntary bars—restricted by low memberships, meager budgets and divisions along social, ethnic and racial lines, as well as areas of practice—to improve admission and disciplinary standards or to foster significant law reform.[4]

In 1918, the American Judicature Society published a proposed integrated bar act which granted to the bar extensive powers over admission, discipline, and disbarment. *Bar Association Act*, 2 J. Am. Judicature Soc'y 111 (1918). The next year the Conference of Bar Association Delegates of the American Bar Association appointed a committee on state bar organization. The committee submitted its report to the Conference in 1920 in St. Louis recommending the creation of state integrated bars. It found that the voluntary associations had done some fine work but were inadequate for the task of elevating the profession. It pointed out that members of the bar of a state have definite legal status as a part of the machinery of state government and constitute a body politic; that they are the advising and moving officers of the court, just as the members of the bench are its deciding and decreeing officers; that a lawyer's responsibilities before the court are similar to those of a government official and not of a private citizen; and hence that the entire bar of a state should be organized and should function in legal recognition of the fact that it is a body politic and an integral part of the judicial department. *To Speed Bar Organiza-*

[4] The integrated bar movement in the 1920's counted among its supporters many of the country's leading legal figures, including Charles Evans Hughes, Elihu Root, John W. Davis, Dean Wigmore, and Robert H. Jackson. *See* Cohen, *The National Call for the Organization of An All Inclusive Bar*, 4 N.Y.L. Rev. 81, 81-83, 135-36 (1926); Jackson, *Compulsory Incorporation of the Bar from the Country Lawyer's Viewpoint*, 4 N.Y.L. Rev. 316 (1926).

tion: Committee of American Bar Association Conference of Delegates Reports on Existing Need and Proffers Practical Advice, 4 J. Am. Judicature Soc'y 83 (1920). The report called to the conference's attention

> the fact that this is the only civilized nation in the world in which the judicial bar is not a self-governing, responsible body politic, and it is likewise the only civilized nation in which the title of a lawyer does not carry with it a guarantee of professional integrity and responsibility.

Id. at 85.

Speaking from his own experience, the committee's head, Judge Clarence N. Goodwin of Chicago, said:

> How has the bar been governed in the past? It is said that it has been governed by courts, but this is true only in a most restricted sense. It has been my privilege to sit upon the bench both in the trial and appellate courts and I know how impossible it is for those in that isolated position to exert any practical control over the actions of the thousands who constitute the bar. Naturally the only effective action courts are able to take is upon information submitted to them, usually by the voluntary bar associations, and if we are frank with ourselves, we must admit that such efforts at bar government have been in the greater part a failure.

Address to New York State Bar Association (Jan. 20, 1922), *reprinted in The Public Function of the Bar: Chairman Goodwin of Conference of Bar Associations Includes Lawyer Legislators in Programme for Integrated Bar*, 5 J. Am. Judicature Soc'y 181, 183 (1922).

North Dakota became the first state to have an integrated bar. Two years later statutes were passed creating integrated bars in Idaho and Alabama. While their structures vary from state to state, today 32 states, other than

Wisconsin, have functioning integrated bars.[5] Integration in these states has been accomplished by (1) legislative action in the form of detailed statutes, or (2) legislative action authorizing the state supreme court to integrate the bar, or (3) promulgation of rules by the state supreme court by virtue of its inherent judicial power to regulate the profession.

Given the perceived need for law reform, it is hardly surprising that regardless of whether the source of the bar's power to act was derived through judicial or legislative action, or both, among the express purposes of the integrated bars in virtually all of these states is "improving the administration of justice." *See, e.g.*, Wis. S.C.R. 10.02(2).

Similarly, it should not be surprising that courts have generally held, as did the Supreme Court of California in *Keller*, that an integrated bar may use its dues to lobby the legislature for law reform believed likely to enhance the fair and efficient administration of justice in the state. *See, e.g.*, *Lathrop*, 367 U.S. at 864 (Harlan, J., concurring); *Hollar v. Government of the Virgin Islands*, 857 F.2d 163, 170-71 (3d Cir. 1988); *Gibson v. The Florida Bar*, 798 F.2d

[5] Alabama (1923), Alaska (1955), Arizona (1933), Arkansas (1938), California (1927), Florida (1949), Georgia (1964), Hawaii (1959), Idaho (1923), Kentucky (1934), Louisiana (1940), Michigan (1935), Mississippi (1930), Missouri (1944), Montana (1974), Nebraska (1937), Nevada (1929), New Hampshire (1968), New Mexico (1925), North Carolina (1933), North Dakota (1921), Oklahoma (1939), Oregon (1935), Rhode Island (1973), South Carolina (1975), South Dakota (1931), Texas (1939), Utah (1931), Virginia (1938), Washington (1933), West Virginia (1945), and Wyoming (1939). In addition, integrated bars have been established in the District of Columbia, the Virgin Islands and Puerto Rico, though the latter was struck down as unconstitutional on grounds unique to its structure and activities. *See Schneider v. Colegio de Abogados de Puerto Rico*, 682 F. Supp. 674, 681-91 (D.P.R. 1988).

1564, 1566 (11th Cir. 1986). To hold otherwise would be to deprive legislatures and the courts of input from a ready source of expertise on a wide range of legal subjects, and frustrate one of the fundamental purposes of the integrated bar movement.

II.

RECENT FIRST AMENDMENT CASE LAW IS CONSISTENT WITH THE HISTORICAL ROLE PLAYED BY INTEGRATED BARS IN LAW REFORM EFFORTS.

Despite this historical perspective, petitioners assert that the rulings of this Court in the context of labor unions now establish that the lobbying activities of the State Bar of California ("California Bar") violate their First Amendment rights. The California Bar addresses in its brief the question of whether these cases apply to the speech of a governmental agency. That issue will not be addressed here. Even if applicable to speech by the California Bar, petitioners misapply the reasoning of this Court's union cases to the integrated bar setting.

The principal lesson of the union cases is that once compelled membership in an organization is itself found to be justified by important governmental interests, individual activities of the association need only be "germane" to those interests. *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 447-57 (1984). *See also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224 (1977) (an individual may not withdraw his financial support from acts that promote "the course which justified bringing the group together"). This general proposition derives from the Court's view that it has "already countenanced a significant impingement on First Amendment rights" in "allowing the union shop at all." *Ellis*, 466 U.S. at 456. Thus, assuming the integrated bar is justified by important public interests,

the expenditures by the bar in furtherance of those interests are permissible, unless the "expenses involve additional interference with First Amendment interests of objecting [members]" not "adequately supported by a governmental interest." *Id. See also* Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. Rev. 995, 1016 (1982) ("In other words, negative First Amendment cases require a sliding scale approach to balancing. The more serious the infringement of individual interests, the more vital the asserted advancement of government interests must be to outweigh the infringement and vice versa.").

In upholding the constitutionality of the integrated bar in *Lathrop*, this Court's plurality opinion reviewed at length the activities of the Wisconsin Bar in light of the multiple purposes assigned the Bar by Wisconsin Supreme Court Rule upon integration:

> [T]o aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged.

Lathrop, 367 U.S. at 828-29 (quoting Wis. S.C.R. 1, § 2 (1956)). While broad in scope, these public purposes are consistent with the broad aspirations for integrated bars generally, and are certainly of a kind with those that caused

the Court to countenance a First Amendment impingement in the union context.

Thus, this Court's decision in *Lathrop* upholding the constitutionality of the integrated bar readily justifies most activities of the bar. The fact that an integrated bar member may be forced to contribute to activities intended to ensure ethical conduct and attorney competence or to provide a forum for the discussion of law "does not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the [bar]." *Ellis*, 466 U.S. at 456. "Petitioners may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint." *Id.* Indeed, this Court has never undermined the general notion that lawyers may properly be required to provide certain public services regardless of personal preference. *See Mallard v. United States District Court*, ___ U.S. ___, 109 S. Ct. 1814, 1823 (1989) (expressly reserving the question whether federal courts "possess inherent authority to require lawyers to serve"); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, ___, 108 S. Ct. 2260, 2267 (1988) (quoting *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 287 (1985)) ("A 'nonresident bar member, like the resident member, could be required to represent indigents and perhaps to participate in formal legal-aid work.' ").

Admittedly, an integrated bar's involvement in direct lobbying of the legislature—as opposed to fostering the study or discussion of legislative proposals or providing technical assistance to the legislature or the courts—may involve an additional impingement on the First Amendment rights of dissenting members. But this activity is also among the most fundamental public and historical purposes of an integrated bar: the promotion and improvement of the administration of justice through advocacy

of law reform. As such, the activity is more than "adequately supported by a governmental interest." Indeed, improving the administration of justice is a state interest of the most compelling kind; it is an interest every bit as vital to our free society as maintaining labor peace, as important as that interest is. *Cf. Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (recognizing the importance of regulating lawyers "since lawyers are essential to the primary governmental function of administering justice"). The compelling importance of this role of integrated bars was recognized by both the Eleventh Circuit in *Gibson*, 798 F.2d at 1568, and the Third Circuit in *Hollar*, 857 F.2d at 170.[6]

III.

STATE COURTS, LEGISLATURES, AND INTEGRATED BARS HAVE DEVELOPED PROGRAMS AND ACCOMMODATED DISSENT IN THE MANNER BEST SUITED TO THE NEEDS OF THAT INDIVIDUAL STATE.

Almost from the outset of the integration movement in this country, integrated bars have undergone periodic reexamination, by bar committees, by courts and by legislatures. Much of this reevaluation has concerned accom-

[6] In *Gibson*, the Eleventh Circuit acknowledged that in determining the acceptable areas for state bar lobbying, the purpose of improving the administration of justice "could arguably extend unlimited discretion to the Bar." 798 F.2d at 1569. That Circuit therefore suggested that for purposes of its lobbying activity the bar "construe 'improving the administration of justice' as pertaining to the role of the lawyer in the judicial system and in society." *Id.* In the case of lobbying activities, the Eleventh Circuit noted the "collective expertise of lawyers . . . grounded in their long-standing relationship with the courts" and suggested that lobbying activities "that infringe upon individual rights should relate directly to that expertise." *Id.*

modation of the interests of dissenting members. This experience has demonstrated the commitment of state courts, legislatures, and bars to respond to concerns of dissenting members in a manner consistent with the number of lawyers, size of the state and broad public policy goals of the individual state. The experiences of Wisconsin, Florida and New Hampshire are illustrative, though not unique. Their experiences, as well as those of California, demonstrate that a stricter federal standard—and commensurate federal judicial oversight—is not needed and not good public policy.

A. The Integrated Bar in Wisconsin.

In 1943, the Wisconsin legislature enacted a statute purporting to establish "an association to be known as 'the state bar of Wisconsin' composed of persons licensed to practice law in this state" and making "membership in the association . . . a condition precedent to the right to practice law in Wisconsin." Wis. Stat. § 256.31 (1943). The Wisconsin Supreme Court construed the statute as an advisory legislative declaration that integration of the bar would promote the general welfare of the state. *Integration of Bar Case*, 244 Wis. 8, 50, 11 N.W.2d 604, 624 (1943). The court further acknowledged its authority and responsibility to regulate the practice of law in the state and its discretionary power as to both the time and form of integration. The court nevertheless deferred any decision regarding integration. *Id.* at 54-55, 11 N.W.2d at 625.

Three years later, in a short opinion, the court again declined to integrate the bar, intimated that the objectives sought by integration could be attained by an adequately supported voluntary association and urged the whole hearted support of the voluntary association by individual members of the bar. *In re Integration of the Bar*, 249 Wis. 523, 25 N.W.2d 500 (1946).

Ten years later, noting that "too many lawyers have refrained or refused to join [the voluntary association], that membership in the voluntary association has become static, and that a substantial minority of the lawyers in the state are not associated with the State Bar Association," the court ordered integration of the bar on an interim basis. *In the Matter of the Integration of the Bar*, 273 Wis. 281, 283, 77 N.W.2d 602, 603-04 (1956).

Following a two-year trial period, the court made the integrated Wisconsin Bar permanent. *In re Integration of the Bar*, 5 Wis. 2d 618, 93 N.W.2d 601 (1958). In that decision, the court noted:

> Under integration the State Bar has increased its services to the lawyers of this state, promoted the high standards of the members of the profession, and increased its contribution to public service and to the administration of law and justice.

Id. at 621, 93 N.W.2d at 602. In answer to the suggestion that integration of the bar was undemocratic, the court observed:

> It is not undemocratic to require those who are privileged to practice law and are entrusted with the duty to secure or protect the property, rights and liberties of others to become bound together in a united effort to increase their own capabilities, to maintain the high standards of the group and to increase the effectiveness of their service to the public. The integrated Bar has been defined as "the process by which every member of the Bar is given an opportunity to do his share in carrying out the public service of the Bar and obliged to bear his portion of the responsibility."

Id. at 622-23, 93 N.W.2d at 603.

The Wisconsin Supreme Court soon had occasion to review the constitutionality of the integrated bar in *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N.W.2d 404 (1960), *aff'd*, 367 U.S. 820 (1961). In upholding the integrated bar, the court quoted approvingly the declaration by its distinguished former chief justice, Marvin Rosenberry, in his 1943 *Integration of Bar* decision "that the dues payable by a lawyer to an integrated bar imposed by state action are in the same category as an annual license fee imposed upon any occupation or profession which is subject to state regulation." *Id.* at 238, 102 N.W.2d at 408.

The court further noted that the rules and by-laws of the Wisconsin Bar "do not compel the plaintiff to associate with anyone, . . . [t]he only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues." *Id.* at 237, 102 N.W.2d at 408. Noting the benefits of the integrated bar, including its function of "securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law," the court determined that an integrated bar promotes the public interest in a way that "far outweighs the slight inconvenience to the plaintiff resulting from his required payment of the annual dues." *Id.* at 238-42, 102 N.W.2d at 409-10.

Since *Lathrop*, the structure, purposes and activities of the Wisconsin Bar have undergone repeated and detailed review by the Wisconsin Supreme Court and by special committees the court has appointed for that purpose. *See In re Regulation of the Bar of Wisconsin*, 81 Wis. 2d xxxv (1978); *State ex rel. Armstrong v. Board of Governors*, 86 Wis. 2d 746, 273 N.W.2d 356 (1979); *In Matter of Discontinuation of State Bar of Wisconsin as an Integrated Bar*, 93 Wis. 2d 385, 286 N.W.2d 601 (1980); *Report of Committee to Review the State Bar*, 112 Wis. 2d xix, 334 N.W. 2d 544 (1983); *In the Matter of the Amendment of State Bar Rules: SCR 10.03(5)*, 127 Wis. 2d xi (1986); *In the Matter of the Petition to Review State Bar By-law Amendments*, 139 Wis. 2d 686, 407 N.W.2d 923 (1987).

While the Wisconsin Supreme Court has consistently upheld mandatory support of the Wisconsin Bar on the grounds that the integrated Bar is better suited to fulfill the obligations of the bar to the public, *see Report of Committee*, 112 Wis. 2d at xxi, 334 N.W.2d at 546, the court also has repeatedly taken steps to accommodate the interests of dissenting members. In particular, the Wisconsin Bar is not permitted to engage in any direct political endorsements or campaigning. *Id.* at xxv, 334 N.W.2d at 549. Any advocacy position taken by the Wisconsin Bar on legislation also requires formal approval by 60% of its democratically-elected Board of Governors. Wis. S.C.R. Ch. 10 App. State Bar By-laws § 9(b).[7] Without deciding whether it was constitutionally required, the supreme court also developed a rebate procedure and ultimately a "dues reduction" plan permitting objectors to deduct their *pro rata* share of bar dues expended for legislative activities at the outset of each fiscal year. *See* Wis. S.C.R. 10.03(5)(b).[8]

---

[7] In fiscal year 1987, the Wisconsin Bar spent approximately 1.3% of dues collected on legislative advocacy. In fiscal year 1988, it spent approximately 1.6%.

[8] On April 19, 1986, the Wisconsin Bar Board of Governors adopted a by-law providing for an arbitration proceeding consistent with *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292 (1986), in the event a dispute arises between the Bar and a member concerning the allocation of expenditures to "legislative activities" as defined under Wis. S.C.R. 10.03(5)(b)1. *See Petition to Review Bar By-law Amendments*, 139 Wis. 2d at 689-94, 407 N.W.2d at 925-27.

B. The Integrated Bar in Florida.

The Florida Bar is an official arm of the Supreme Court of Florida, initially integrated pursuant to that court's inherent power and now authorized by that tribunal's exclusive constitutional authority to regulate and discipline persons admitted to the practice of law in Florida. *Petition of Florida State Bar Ass'n*, 40 So. 2d 902 (Fla. 1949); Fla. Const. art. V, § 15.

In its original opinion which integrated The Florida Bar, the Supreme Court of Florida specifically reviewed and favorably noted the involvement of the integrated bar of California within the legislative arena. *Petition of Florida State Bar Ass'n*, 40 So. 2d at 905. Consequently, The Florida Bar has actively participated in the legislative process since its formal integration in 1950.[9] The Bar's legislative positions are formulated through an open process culminating in formal action by its governing board.

Limitations on legislative activity are provided by Florida Supreme Court-promulgated Rules Regulating the Florida Bar and other codified legislative policies and procedures, and court opinions interpreting those provisions. The Florida Bar's charter document authorizes, with "continued direction and supervision by the Supreme Court of Florida," a program for "providing information and advice to the courts and other branches of government concerning current law and proposed or contemplated changes in the law." *Rules Regulating The Florida Bar 2-3.2*, 62 Fla. B.J. 47 (1989). Under applicable policies, neither The Florida Bar nor any of its committees may take a position on legislation, either as proponent or opponent, unless the Bar's governing board initially determines that the matter is related to the codified purposes of the organization. Adoption of any legislative position requires a subsequent affirmative vote of two-thirds of those present at any regular meeting of the Bar's 51-member Board of Governors, two-thirds of the organization's Executive Committee or the Bar president. As a further safeguard, the Bar's Board of Governors, Legislative Committee and Executive Committee allow appearances of any interested persons during consideration of any legislative proposal. Legislative topics pending for consideration are previewed in the Bar's official member publications and final Board action on such matters is noted in subsequent news accounts for appropriate member followup. *See In re Amendment to Integration Rule of The Florida Bar*, 439 So. 2d 213, 214-15 (Fla. 1983); *Rules Regulating The Florida Bar 2-9.3*, 62 Fla. B.J. 52 (1989); *Legislative Policy and Procedure of The Florida Bar*, 62 Fla. B.J. 123 (1989).

Appellate court review of The Florida Bar's legislative activities has occurred at both the federal and state level. *See Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986); *The Florida Bar Re: Thomas R. Schwarz*, No. 70,702 (Fla. Oct. 26, 1989); *The Florida Bar Re: Schwarz*, 526 So. 2d 56 (Fla. 1988); *In re Amendment to Integration Rule of the Florida Bar*, 439 So. 2d 213 (Fla. 1983); and *In re Florida Bar Bd. of Governors' Action*, 217 So. 2d 323 (Fla. 1969).

During the pendency of the *Gibson* appeal, this Court handed down its decision in *Chicago Teachers' Union*. With the added benefit of the subsequent opinion in *Gibson*, the Bar further refined its procedures governing the use of compulsory dues for legislative activities. Those new procedures were submitted to the Supreme Court

[9] The full range of the Bar's legislative activities constitute 2.5% of the organization's 1989-90 operating budget of $14.1 million. *Bar Services Report*, 62 Fla. B.J. 13, 30-31 (1989).

of Florida for review and were approved on June 2, 1988. *Rules Regulating The Florida Bar: The Florida Bar re Amendment to Rule 2-9.3*, 526 So. 2d 688 (Fla. 1988).[10]

In its ongoing review and oversight of the Bar's legislative activities, the Supreme Court of Florida has recently reiterated its support of existing policies while adopting further guidelines for determining the scope of permissible lobbying activities of The Florida Bar. The court emphasized continued sensitivity to individual member concerns with this additional admonition:

> However, we also suggest that the Board exercise caution in the selection of subjects upon which to take a legislative position so as to avoid, to the extent possible, those issues which carry the potential of deep philosophical or emotional division among the membership of the Bar. In any event, we also wish to make clear that any member of The Florida Bar in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a timely petition with this Court.

The Florida Bar re: Thomas R. Schwarz, No. 70,702, slip op. at 7 (Fla. Oct. 26, 1989).

[10] The Bar's Rules and Procedures provide an explanation of the basis for the Bar's calculation of dues monies attributable to its legislative activities; a reasonably prompt opportunity to challenge the amount of such calculation or the propriety of a legislative position before an impartial decisionmaker; and an escrow option for those amounts reasonably in dispute while such legislative challenges are pending. By unpublished order, the Northern District of Florida found the provision met the safeguards and requirements necessary for protection of members' First Amendment rights set out in both *Chicago Teacher's Union* and the Eleventh Circuit opinion in *Gibson*. *Gibson v. The Florida Bar*, No. TCA 84-7109-MMP (N.D. Fla. May 2, 1989), *appeal docketed*, No. 89-3388 (11th Cir. May 3, 1989).

C. The Integrated Bar in New Hampshire.

Petitioners in the instant case cite approvingly the New Hampshire Supreme Court's decision in *Petition of Chapman*, 128 N.H. 24, 509 A.2d 753 (1986). They offer *Chapman* for its recognition of the union cases, and for acknowledging the potential risks to negative First Amendment freedoms posed by political activities of an integrated bar. Petitioners' Opening Brief at 18-19. Yet petitioners' characterization of *Chapman* belies the greater lessons that the decision truly presents.

When the New Hampshire Supreme Court ordered permanent unification in 1972 (following a three-year trial period), it commented upon the issue of legislative activity and noted:

> Clearly, it is open to any member to participate in the formulation of policies, and if need be to oppose association action in the legislative field. The objection deserves consideration by the association, but does not require restoration of the association to a voluntary status.

In re Unified New Hampshire Bar, 112 N.H. 204, 207, 291 A.2d 600, 602 (1972).

Fourteen years later, the New Hampshire Supreme Court was not displeased with what it had done. Noting that "the constitutionality of the integrated, or unified, bar is not at issue here," the *Chapman* court went on to add:

> The Association has played a crucial role in maintaining and upgrading the quality of the bar in New Hampshire. The lawyer referral network has increased the availability of, and access to, lawyers in this State. Its public education and information efforts have been exemplary, and its continuing education program is among the best. The various committees of the Association provide substantive and procedural assistance

> both to the bar and to the courts. Unification of the bar may not be the sole reason for these successes, but we are confident that it has played a substantial role in contributing to these accomplishments.

128 N.H. at 29, 509 A.2d at 757.

The decision in *Chapman* goes well beyond a recognition of concern for negative First Amendment rights; it offers a "balancing test" between those rights and the Bar's "core responsibilities." *Id.* at 30-31, 509 A.2d at 758. The notion that a unified bar must refrain from all political activity, or that a dues rebate is required—the root of petitioners' assertions before this Court—are expressly rejected in *Chapman*. *Id.* at 40, 509 A.2d at 764-65. Consideration of the Bar's "core responsibilities" is not taken lightly, either in *Chapman* or in earlier New Hampshire Supreme Court decisions.

When the court went on to find that the Bar had exceeded its authority in opposing certain legislation, it issued not a "draconian" prohibition of all lobbying, *id.* at 40, 509 A.2d at 764, but rather a balancing test of competing interests, and offered further guidelines and redefinition of those important "core responsibilities." *Id.* at 31-32, 509 A.2d at 758-59. *See also id.* at 41, 509 A.2d at 765-66 (Souter, J., concurring).

The lessons of *Chapman* have been implemented throughout the entire legislative advocacy process, assuring review consistent with *Chapman* on at least two levels for every piece of legislation considered by the New Hampshire Bar.[11]

[11] The Rhode Island Bar Association, also integrated, decided to be "generally guided" by the *Chapman* decision as well. *See President's Annual Report*, Rhode Island Bar J. 3, 4 (June/July, 1987).

First, the Legislation Committee of the New Hampshire Bar Association, appointed annually by the Bar President to represent a cross-section of the Bar membership, conducts a review of each bill to assure compliance with *Chapman*. That is followed in relatively short order by a *de novo* second review by the Bar's Board of Governors, a group of twenty-one individuals elected by democratic process, with an annual turnover rate of approximately one-third. Throughout the process the Bar Association's legislative representative is fully involved, offering his or her *Chapman* perspective as well.

This process acts to secure all of the balancing and guidance that the *Chapman* decision demands. At both levels "circumspection is the watchword," *id.* at 32, 509 A.2d at 759 (*see also In re Unification of the New Hampshire Bar*, 109 N.H. 260, 266, 248 A.2d 709, 713 (1968)), and caution is employed "[w]here substantial unanimity does not exist or is not known to exist within the bar as a whole." *Chapman*, 128 N.H. at 32, 509 A.2d at 759.[12] Those with dissenting views from within the Bar membership have, on occasion, been invited to the Board debate, with the resulting exchanges proving productive.

Furthermore, since the Bar has responded to *Chapman*, it has more frequently taken an informational position on legislation and it has been recognized for its achievement. In his address at the 1989 Bar Association Annual Meeting, Chief Justice David A. Brock, author of the majority opinion in *Chapman*, commented that "it hasn't gone unnoticed at the Supreme Court that the Bar Association has managed to be a constructive force in the legislative

[12] In fiscal year 1988-89, the New Hampshire Bar spent approximately 2% of dues collected on legislative advocacy.

process while at the same time complying with the requirements of the *Chapman* case." Address, 16 *New Hampshire Law Weekly* 101, 104 (July 19, 1989).

With the experiences of Wisconsin, Florida, New Hampshire and numerous other integrated bars across the country as examples, it is clear that petitioners' requested relief is quite undesirable and unnecessary. At least in the case of California, as its Supreme Court expressly found, the requested relief would also be unworkable.

The diversity that exists among the many unified bars, large and small, urban and rural, serves as a successful medium for self-reliance and self-governance. The integrated bar has also served as a vehicle by which state courts, restricted by limited resources, can effectively supervise the bar and help ensure sound law reform. The balance of competing interests—between those of individual practitioners and the integrated bar's "core responsibilities"—inherent in the bar is best accomplished by continuing to leave to each state legislature and court the responsibility of fashioning its individual bar in the manner most likely to meet that state's needs.

CONCLUSION

For all the reasons stated, integrated bars should be permitted to continue to fulfill their historic role in shaping law reform, and to fulfill the broader public policies for which they were established. Accordingly, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

Of Counsel:

PAUL F. HILL
General Counsel
BARRY S. RICHARD
Of Counsel to
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5600

STEPHEN L. TOBER
Counsel for
The New Hampshire Bar Association
Aeschliman & Tober, P.A.
381 Middle Street
P.O. Box 1151
Portsmouth, NH 03801
(603) 431-1002

JOHN S. SKILTON *
WILLIAM M. CONLEY
ROBERTA F. HOWELL
FOLEY & LARDNER
1 South Pinckney Street
Post Office Box 1497
Madison, WI 53701-1497
(608) 257-5035

* *Counsel of Record for Amicus Curiae*